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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Federal-State Joint Board	)	CC Docket No. 96-45
on Universal Service	)	(Report to Congress)

To: The Chief, Common Carrier Bureau

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF NEVADA

The Public Utilities Commission of Nevada ("Nevada"), by its attorney, and pursuant to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on January 5, 1998, in the above-referenced proceeding,[1/] hereby submits its Comments concerning the Commission's implementation of the universal service provisions of the Telecommunications Act of 1996 and the report which the Commission must make to Congress with respect thereto.

The Public Notice solicited comment on, *inter alia*, "the Commission's decisions regarding the percentage of universal service support provided by Federal mechanisms and the revenue base from which such support is derived."[2/] Nevada directs its comments herein to the latter of these issues.

1/ *See* Public Notice, DA 98-2, released January 5, 1998 ("Public Notice"). The deadline established in the Public Notice for the filing of the instant comments was subsequently extended by the Commission from January 20, 1998 until January 26, 1998. *See Federal-State Joint Board on Universal Service*, DA 98-63, released January 14, 1998 (*Order* in CC Docket No. 96-45 (Report to Congress)). Accordingly, these comments are timely filed.

2/ Public Notice, slip op. at 2.

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Specifically, in its *Report and Order* on universal service,[3] the Commission asserted that it possessed the authority to fund Federal universal service support mechanisms by assessing both the interstate and intrastate revenues of interstate telecommunications service providers.[4] In so doing, it impermissibly intruded into the long-established authority of the States to regulate intrastate matters in violation of the Congressional intent underlying Section 254 of the Communications Act of 1934, as amended (the "Act").[5] As demonstrated herein, the Commission's extra-jurisdictional expedition is unsupported by the statute, its legislative history, and Section 152(b) of the Act

I. NEITHER THE LANGUAGE OF SECTION 254 NOR ITS LEGISLATIVE HISTORY SUPPORT THE COMMISSION'S DECISION TO ASSESS INTRASTATE REVENUES FOR THE FEDERAL UNIVERSAL SERVICE FUND

In reaching its conclusion that it possesses authority to assess interstate carriers' intrastate revenues for the Federal universal service fund ("USF"), the Commission erroneously interpreted Section 254 to confer upon the agency primary responsibility and authority for implementing the statute's mandate. Although the Commission nodded to the principle of a partnership with State authorities,[6] its discussion manifests the evident view that the role of the States in effecting the

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[3] *Federal-State Joint Board on Universal Service*, FCC 97-157, released May 8, 1997 (*Report and Order* in CC Docket No. 96-45) ("*Report and Order*").

[4] *Id.*, slip op. at 417 ¶ 813. Although the Commission declined to exercise this asserted authority with respect to the funding of support mechanisms for rural, insular, and high-cost areas and low income consumers, it had no reservation about doing so with respect to the support mechanisms for schools and libraries. *Id.*, slip op. at 419 ¶ 818.

[5] 47 U.S.C. § 254. Section 254 was added to the Act by the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56.

[6] *See, e.g., Report and Order*, slip op. at 419 ¶ 818.

objective of universal service is secondary at best.[7] Contrary to the Commission's assertion, the "plain language" of Section 254[8] does not support such an interpretation. Indeed, it contradicts it, making clear that the States share co-equal authority for ensuring the effectuation of Section 254's goal.

Underscoring the importance of the States' role in the process, Section 254 at its very outset charges not the Commission but the Joint Board with primary responsibility to identify the regulatory changes necessary to implement the universal service provisions of the Communications Act. This responsibility "includ[es] the definition of services that are supported by Federal universal support mechanisms and [creation of] a specific timetable for completion of such recommendations."[9] The Commission's tenuous reliance on the statute's requirement that universal service support mechanisms be "sufficient,"[10] does not justify the FCC's encroachment into the States' jurisdiction for, as the Commission itself concedes, "the states are independently obligated to ensure that support

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[7] *Id.*, slip op. at 418 ¶ 816. For example, the Commission stated:

> In essence, the provisions of section 254 direct that the Commission ultimately prescribe what services should be supported, and they mandate that the Commission ensure that the support for those services is "specific, predictable, and sufficient." Although the states are independently obligated to ensure that support mechanisms are "specific, predictable, and sufficient" and that rates are "just, reasonable, and affordable," there is no doubt that the Commission -- with the help of the states -- is to establish in the first instance what services should be supported and what are the necessary mechanisms to do so.

Id. (footnotes omitted).

[8] *Id.*, slip op. at 417 ¶ 814.

[9] 47 U.S.C. § 254(a)(1) (emphasis added).

[10] *Report and Order*, slip op. at 417 ¶ 815 (citing 47 U.S.C. § 254(b)(5), (d)).

mechanisms are 'specific, predictable, and sufficient' and that rates are 'just, reasonable, and affordable.'"[11/]

As Missouri Public Service Commissioner Kenneth McClure and South Dakota Public Utilities Commissioner Laska Schoenfelder demonstrated in their separate statement dissenting from the recommendations of the Joint Board, the legislative history of Section 254 evidences Congress' intention to limit the Federal USF to interstate revenue and reserve for the States exclusive authority over intrastate revenues.[12/] Commissioners McClure and Schoenfelder correctly observed that the conferees on the Telecommunications Act substantially changed the universal service measure originally proposed by the Senate (S. 652) in order to achieve this bifurcated arrangement.[13/]

As originally passed by the Senate, S. 652 drew no distinction between interstate, intrastate, and/or foreign carriers. Rather, it created a coordinated Federal-State universal service system and prescribed that they would all be required to participate "on an equitable and nondiscriminatory basis, in the specific and predictable mechanisms established by the Commission and the States to preserve and advance universal service."[14/] Moreover, in keeping with this scheme, S. 652 provided no express authority to the States to levy assessments upon intrastate services and did not differentiate between the interstate and intrastate jurisdictions.

[11/] *Id.*, slip op. at 418 ¶ 816 (citing 47 U.S.C. § 254(b)(5), (d), (i)).

[12/] Dissenting Statement of Commissioners Kenneth McClure, Missouri Public Service Commission and Laska Schoenfelder, South Dakota Public Utilities Commission, April 21, 1997 (dissenting from the Majority Opinion of the State Members of the Joint Board on the Funding of Universal Service, dated April 24, 1997) (hereinafter, "McClure/Schoenfelder Statement").

[13/] *Id.* at 7.

[14/] *See* S. 652, § 253(a)(6), (c).

By contrast, the conferees on the measure abandoned the notion of a "coordinated Federal-State" framework for universal service and, instead, expressly gave States assessment authority over the intrastate jurisdiction by requiring carriers that provide intrastate services to contribute to state universal service funds as directed by the States.[15/] Moreover, they further underscored the discrete nature of the state and federal jurisdictions by providing that States' universal service funding mechanisms may not burden the Federal USF.[16/] By effecting these changes, the conferees plainly intended to transform the unitary universal service regime created by the original Senate bill into two complementary funding systems: a Federal system reliant upon interstate revenues and overseen by the FCC, and a State system dependent upon intrastate revenues and managed by the individual States.

As Commissioners McClure and Schoenfelder also accurately reasoned,[17/] the Commission's claim of primacy over the universal service scheme and its assertion of authority over intrastate revenues logically conflicts with the bifurcated support structure erected by Congress because if the Commission had the primary right to fund the Federal USF through an assessment on intrastate revenues, any State funding mechanism propounded under Section 254(f) which relied on such revenues would "rely on or burden" the Federal USF contrary to that statute. Several commenters before the Commission[18/] also raised this double assessment problem, asserting that it would hinder

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15/ *See* 47 U.S.C. § 254(f).

16/ *Id.* § 254(e).

17/ *See* McClure/Schoenfelder Statement at 9.

18/ *Report and Order*, slip op. at 420 ¶ 820 & n.2090 (citing Alabama PSC comments at 2-3; Kansas CC comments at 6; Kentucky PSC comments at 2-3).

States' abilities to address state universal service issues. The Commission's *Report and Order* failed to provide a compelling rebuttal to this valid concern.[19/]

The Commission's first response -- *i.e.*, that it was "not clear . . . how states would be hindered" because "many" of the contributing carriers would likely also be eligible to receive both state and federal support -- makes little sense in light of the Commission's asserted, albeit unexercised, authority to require carriers to seek authority from states to recover a portion of their Federal USF contribution from intrastate rates.[20/] In such a case, a state imposing an assessment upon a carrier's intrastate revenues in respect of that carrier's Federal USF contribution would have to impose yet another assessment upon the same revenues if it desired to adopt its own state universal service funding mechanism.[21/]

The Commission's second response -- *i.e.*, that "the statutory language plainly envisions that the state mechanisms will be in addition to the federal mechanisms"[22/] -- is a non sequitur. Even assuming, *arguendo*, that the Commission's assertion is correct, it does not logically follow that Congress intended to empower the Commission to fund those federal mechanisms by drawing upon revenues historically within the States' exclusive jurisdiction. As the foregoing discussion demonstrates, Congress plainly had no such intent in mind when it enacted Section 254.

19/ *Id.*, slip op. at 420-21.

20/ *See id.*, slip op. at 414-15 ¶ 807.

21/ As Commissioners McClure and Schoenfelder point out, the FCC's interpretation also results in discriminatory and inequitable assessments upon carriers contrary to Section 254 because it affords carriers who operate only on an intrastate basis a competitive advantage *vis-a-vis* carriers who have both intrastate and interstate operations. Thus, the Commission's interpretation fails the statute's requirement of competitive neutrality. *See* McClure/Schoenfelder Statement at 10.

22/ *Id.*, slip op. at 421 ¶ 820.

II. THE COMMISSION'S ASSESSMENT UPON INTRASTATE REVENUES VIOLATES SECTION 2(b) OF THE COMMUNICATIONS ACT

Section 2(b) of the Communications Act provides, in relevant part, that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect . . . (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[23/] The Supreme Court has stated that "[b]y its terms, this provision fences off from FCC reach or regulation intrastate matters -- indeed, including matters `in connection with' intrastate service" and does so in language which "is certainly as sweeping as the wording of the provision declaring the purposes of the Act and the role of the FCC."[24/] Indeed, the Court observed that Section 2(b) "not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction."[25/]

The Court, in the *Louisiana Public Service Commission* case, rebuffed a statutory construction by the Commission which was very similar to that advanced in the *Report and Order*. The Court found that, although it was possible to find some support in the language of the statute (Section 220 of the Communications Act) for the Commission's position that FCC depreciation rules should apply both to interstate carriers subject to the FCC's jurisdiction and to intrastate carriers, the statute in question was not sufficiently "unambiguous or straightforward as to override the command of [Section 2(b)] that `nothing in this chapter shall be construed to apply or to give the Commission

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23/ 47 U.S.C. § 152(b).

24/ *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).

25/ *Id.* at 376-77 n.5.

jurisdiction' over intrastate service."[26] In this case, Section 254 provides even less clarity with respect to the Commission's authority to assess intrastate as well as interstate revenues for the Federal USF than Section 220 did for the Commission's action in *Louisiana Public Service Commission.*[27]

Notwithstanding this clear limitation on the Commission's regulatory jurisdiction, the *Report and Order* erroneously concludes that Section 2(b) imposes no boundaries on the FCC's ability to assess intrastate revenues for the purpose of funding the Federal universal service mechanisms.[28] The Commission asserts this is so ostensibly because such an assessment does not constitute regulation of intrastate rates or services.[29] However, the language of Section 2(b) does not extend merely to FCC actions affecting rates or services: It also encompasses "charges." In *Louisiana Public Service Commission*, the Court interpreted this element of Section 2(b) to embrace a prohibition on FCC action which intrudes into the States' exclusive authority over the treatment of carrier costs, including taxes and operating expenses which are wholly within the intrastate sphere.[30]

Here, the Commission's regulatory assessment for universal service support clearly constitutes an element of the affected carriers' cost structure in the same way that taxes and operating expenses do. Moreover, as the Commission acknowledges, the assessment is severable into interstate and

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[26] *Id.* at 377 (emphasis in original).

[27] In this regard, it is particularly noteworthy that Congress eliminated from the final text of § 254, language which would have expressly given the FCC the interpretive power it now claims by adding § 254 and its companion provisions to the exceptions enumerated in the opening clause of § 2(b). *See* S.652, 1st Sess., Section 101(e)(2) (as passed by Senate in June, 1995) *and* S. 652, Section 101(e)(1) (as passed by House in October, 1995, following amendment in nature of substitute).

[28] *See Report and Order*, slip op. at 421-22 ¶¶ 821-23.

[29] *Id.*, slip op. at 421 ¶ 821.

[30] *Louisiana Public Service Comm'n*, 476 U.S. at 374, 375.

intrastate components. Accordingly, the Commission may no more place an assessment upon a carrier's intrastate revenues than it may require state commissions to follow FCC depreciation practices for intrastate rate making purposes: As the Court explained, "Section [2(b)] constitutes . . . a congressional *denial* of power" to do so.[31/]

III. CONCLUSION

As the foregoing discussion demonstrates, the Commission's assertion of authority to fund the Federal universal service mechanisms set forth in the *Report and Order* by assessing interstate carriers' revenues from intrastate as well as interstate operations lacks support in the plain language of Section 254 and its legislative history. Moreover, the Commission's assertion of such authority also fails to comport with Section 2(b) of the Communications Act and relevant case precedent. The Commission has erroneously interpreted its statutory mandate. The Commission's report to Congress should accordingly address these issues.

Respectfully submitted,

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[31/] *Id.* at 374 (emphasis in original); *cf. National Ass'n of Reg. Utility Commissioners v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989). While the rule of *Louisiana Public Service Commission* would permit the FCC to regulate intrastate services where jurisdictional separation is not possible, as demonstrated above, no such impossibility is present here. Separation of interstate and intrastate revenues has been performed for years in connection with the comparison of revenues to costs within each sphere pursuant to FCC and State price-cap and rate-of-return rules.